STATE OF VERMONT
RUTLAND COUNTY

STATE OF VERMONT	)	**Rutland District Court**
	)	**Docket No. 1118-7-08 Rdcr**
	)	**985-7-08 Rdcr**
v.	)	
	)	
	)	
KEVIN VANBUREN	)	
	)	

DECISION ON MOTIONS TO DISMISS FOR LACK OF PRIMA FACIE CASE

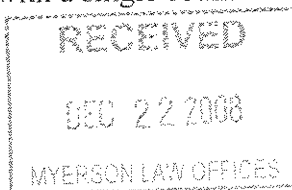
The above matter came before the Court on Defendant's Motions to Dismiss for Lack of Prima Facie Case pursuant to V.R.Cr.P. 12(d)(1). Hearings were held on December 3, 2008 and December 10, 2008.

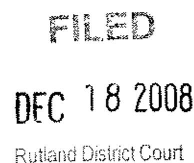
Defendant's Motion to Dismiss for Lack of Prima Facie Case for Driving Under the Influence of Intoxicating Liquor was filed on September 26, 2008. Defendant's Motion to Dismiss for Lack of Prima Facie Case for Unlawful Mischief was filed on November 4, 2008. Defendant's Motion to Dismiss for Lack of Prima Facie Case for Impeding a Police Officer was also filed on November 4, 2008. The State filed its response for Lack of Prima Facie Case for Unlawful Mischief and for Lack of Prima Facie Case for Impeding a Police Officer on November 14, 2008.

Defendant, Kevin VanBuren, was present at the hearings and was represented by Bradley D. Myerson, Esq. The State of Vermont was represented by Deputy State's Attorney Marc D. Brierre.

Background

Defendant stands charged with five counts in two separate docket numbers. In Docket No. 1118-7-08 Rdcr, he is charged with a single count of DUI, pursuant to 23





V.S.A. § 1201(a)(2). In Docket No. 985-7-08 Rdcr, he is charged with four counts: (1) Simple Assault, pursuant to 13 V.S.A. 1023(a)(1), (2) Unlawful Trespass, pursuant to 13 V.S.A. 3705(a), (3) Unlawful Mischief, pursuant to 13 V.S.A. § 3701(c), and (4) Impeding a Public Officer, pursuant to 13 V.S.A. § 3001.[1]

In opposing the Motions to Dismiss the State has submitted the affidavits of Russell Thompson, June Thompson, Louis P. Perry, Jr., Trooper Blake Cushing, as well as an affidavit and two supplemental affidavits by Trooper Douglas R. Norton. In addition, the State relies upon the hearing testimony of Russell Thompson, June Thompson, Trooper Cushing, and Trooper Norton.[2] Viewing the evidence in the light most favorable to the State, and excluding any modifying evidence, *State v. Baron*, 2004 VT 20, ¶ 2, 176 Vt. 314, the State's affidavits and testimony set forth the following facts.

June and Russell Thompson reside at 77 Bull Frog Hollow Road, Wells, Vermont. On the morning of July 5, 2008, at approximately 2:30 A.M., June Thompson was asleep on her couch when she was awakened by a car horn and loud screeching outside of her house. She witnessed a vehicle drive into her driveway and onto her front lawn. She got up, locked the doors, and awoke her husband, Russell Thompson, who was sleeping in the bedroom.

June Thompson watched from the window as the vehicle drove away, down her driveway and onto Bull Frog Hollow Road. She then heard the car go behind the trees that separate the VanBuren property, at 75 Bull Frog Hollow Road, from the Thompson property. She heard the car go up the VanBuren driveway. She did not hear any other

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[1] The charges arise out of events occurring at the defendant's home and the next-door neighbors' residence on Bull Frog Hollow Road in Wells. He is not charged with any conduct occurring during the time he was being transported to the hospital, nor for any conduct occurring at the hospital.

[2] In support of the Motions, defendant has submitted the affidavits of his mother, Desiree DeBartolo, and himself. Defendant's brother, Dennis VanBuren, testified at the hearing on December 10, 2008.

car come or go from the VanBuren property between that time and the time the police arrived.

Russell Thompson grabbed his shotgun and proceeded out of the front door and onto his porch to see what was happening outside. Defendant Kevin VanBuren, the Thompson's neighbor, came from behind his own shed and began yelling profanities and threatening to kill Mr. Thompson. Defendant was "drunk and stumbling around." Mr. Thompson demanded that defendant back up or that he was going to shoot him. Defendant said "Kill me, kill me!"

Defendant then approached Mr. Thompson and Mr. Thompson attempted to strike him with the butt of the gun. Defendant caught the butt of the gun with his hand, and the two struggled to the ground, fighting over the gun. During this struggle, defendant punched Mr. Thompson in the nose. At this point, June Thompson came outside and witnessed defendant on top of her husband. Mr. Thompson instructed his wife to get a gun and shoot defendant.

Defendant then got up off the ground, "stumbled away," and said that he was going to kill Mr. Thompson. Believing that defendant had guns in his home and that he may carry out his threat to kill him, Mr. Thompson fired two shots at defendant as he was about 60-100 feet way. Both shots missed. As described by Mr. Thompson, defendant "disappeared and he was screaming – ranting and raving like he does."

Mr. Thompson then got his rifle in case defendant came back to shoot him. Defendant came back to the Thompson's property at an area near the corner of their garage. Defendant waived his arms and said "Shoot me, shoot me!" Mr. Thompson aimed, but did not shoot. Defendant then walked away and Mr. Thompson heard him at

his own house "screaming very loudly." Officers of the Granville, New York Police Department then arrived at the Thompson residence. The Vermont State Police arrived shortly thereafter.

Louis P. Perry, Jr. lives across from the Thompsons on Bull Frog Hollow Road. He was awake on the morning of July 5, 2008 at about 2:30 A.M. At that time, he heard a car driving up the Thompson's driveway - the driver was blowing the horn repeatedly and "peeling rubber." He observed that "the car was racing up the driveway and then made an awful, terrible noise like it was going through something and getting stuck in dirt or rocks in the yard." He then heard the car race back down the Thompson driveway and go up the VanBuren driveway next door.

Within minutes he heard voices yelling and screaming. Mr. Perry knew the voices to be those of Russell Thompson and Kevin VanBuren. He then heard a scuffle and fighting. Mr. Perry then heard Russell Thompson yell "get the gun June, shoot him, shoot him!" Then, two gun shots went off. Mr. Perry's girlfriend called over to the Thompson's residence to make sure they were alright, and then called 911. The police arrived shortly thereafter.

Mr. Perry did not see the vehicle or the driver of the vehicle. However, Mr. Perry heard only one vehicle during this time period. He did not hear any other vehicles leave the Van Buren driveway before the police arrived.

At approximately 2:34 A.M., Trooper Cushing and Trooper Norton of the Vermont State Police were dispatched to 77 Bull Frog Hollow Road. At approximately 2:49 A.M., Trooper Cushing arrived at the Thompson's residence.

He spoke with Russell Thompson shortly, and then proceeded to 75 Bullfrog Hollow Road to speak with defendant. While Trooper Cushing was walking up the driveway, defendant came outside "yelling and screaming with a phone in his hand." Trooper Cushing identified himself as a police officer and asked to speak to defendant. Defendant was "extremely agitated and was constantly moving."

Defendant was clad only in a towel and socks. Defendant moved in and out of his house, and kept repeating this behavior throughout the entire incident. Trooper Cushing asked defendant if he was Kevin VanBuren and defendant answered "No." Defendant yelled at Trooper Cushing and threatened to kill him. He made multiple references to getting a shotgun and shooting Trooper Cushing and the officers of the Granville, New York Police Department.

At one point, defendant came out of the house and spit at Trooper Cushing. The spit missed. He then told Trooper Cushing that he was going inside to get a shotgun and was going to come back to kill him. Trooper Cushing watched him go inside, and was able to partially view him throughout this time. When defendant came back outside, he made eye-contact with Trooper Cushing, but kept his hands inside the house. Defendant then pulled his hands out from behind the door, made a motion with his hands as if he were shouldering a rifle, and pointed the imaginary rifle at Trooper Cushing. According to Trooper Cushing, defendant "said something to the effect of bang I would have fucking killed you."

Defendant then went back into the house and observed that Trooper Cushing was able to see him. Defendant walked up to a window and punched it, causing his right hand to break. Defendant was approximately 1 foot from Trooper Cushing at this point, with

the window between them. His wrist and hand began to bleed. Defendant then came outside multiple times and threatened to harm the officers once again. At about this time, approximately 3:01 A.M., Trooper Norton arrived.

Trooper Cushing once again identified himself and attempted to speak to defendant about the incident which occurred between him and Russell Thompson. Defendant advised Trooper Cushing that he did not know what he was talking about. He then came outside, displayed his right wrist, and told Trooper Cushing that he had been shot by his neighbor. Trooper Cushing tried to convince defendant that medical attention was necessary for the hand and wrist.

Defendant continued to threaten to shoot the officers. He ran inside and slammed the door. The police officers were able to maintain visual contact for most of this time. Trooper Norton believed that defendant seemed more determined to procure a firearm and kill law enforcement, as his voice tone became louder and more direct. Trooper Norton ordered the officers to back away from the house. Defendant "continued his erratic behavior of going in and out of his house." Throughout this time, defendant was yelling at the officers and threatening to shoot them.

Defendant's brother, Dennis VanBuren, then arrived at the house. He attempted to speak with defendant several times before eventually succeeding. Much of the conversation was loud yelling. During this time, defendant's "erratic behavior" continued.

Defendant eventually came out of the house at the urging of his brother and came down the driveway. Trooper Cushing ordered defendant to kneel down and he complied. Trooper Norton put defendant to the ground and Trooper Cushing placed him in

restraints. Defendant was taken into custody without incident. According to Trooper Cushing, "[i]t was obvious at the start and once VanBuren was in custody that he was extremely intoxicated." This was the first time that the police issued any order directing the defendant's action. Defendant complied with the orders given to him by police at this time.

Defendant's right hand and wrist required medical attention. While waiting for the rescue unit to arrive, defendant's behavior was "still erratic." According to Trooper Cushing, "[h]e [defendant] would go from calm, to agitated." Defendant attempted to pull away from Trooper Cushing, so Trooper Cushing placed him to the ground with a leg sweep. Trooper Cushing "smelled a strong odor of intoxicants coming from him and his breath. Van Buren's eyes were also bloodshot and watery. VanBuren appeared to be heavily intoxicated."

After defendant was in custody at the scene, Trooper Norton was able to go the Thompson residence and further investigate the scene. During his investigation, Trooper Norton observed tire tracks that traveled up the driveway and into the Thompson's front yard, and eventually into their flower bed.

Trooper Norton observed a silver Honda Civic parked on the south side of the VanBuren residence. The width of the vehicle was consistent with the width of the tire impressions that were found in the Thompson's yard.

While waiting for the rescue unit, defendant made numerous racial slurs and violent threats about an African-American Vermont Trooper who was not present at the scene. Defendant also threatened to harm Trooper Cushing and the other officers present.

Once the rescue unit arrived, defendant refused to be seen by them. Defendant's brother eventually persuaded him to be seen by rescue. Once inside the ambulance, Trooper Cushing took defendant's right hand out of restraints so that it could be treated and attached his left hand to the gurney. While the ambulance was in motion, defendant tried to get out of the gurney and unbuckled the buckles on the gurney. Trooper Cushing then placed defendant's right hand back in restraints and attached it to the gurney.

During the ride to Rutland Regional Medical Center, defendant made numerous sexual profanities and derogatory remarks towards Trooper Cushing and the rescue personnel. Defendant then told Trooper Cushing that he was always in Wells at night and that Trooper Cushing could come and find him later without the badge. Trooper Cushing believed that defendant wanted to fight him.

Upon arriving at the hospital, defendant refused to get out of the ambulance. He spread his legs and placed them against the cabinets so that the gurney could not roll out of the ambulance. Defendant refused to put his legs down. Trooper Cushing tried to move defendant's legs, but defendant grabbed Trooper Cushing's right arm with his left hand and tried to pull Trooper Cushing towards him. Trooper Cushing then struck defendant in the left shoulder with his left fist. Defendant released his hand. Trooper Cushing was finally able to free one of defendant's legs, but defendant pushed off with the other leg, moving the gurney, and pinning Trooper Cushing's legs against the gurney and the seat bench. The gurney slammed into Trooper Cushing, causing him pain in his shins and knees. Other medical staff arrived and they were able to move defendant from the ambulance.

While at the hospital, defendant was screaming profanities and degrading remarks. Once in the emergency room, he yelled at the hospital staff and called them names. Defendant called the emergency room physician, who was Asian-American, racial slurs and other derogatory remarks. A 2-inch piece of glass was removed from defendant's right wrist. Defendant was extremely difficult and would not cooperate with the emergency room personnel. At one point, defendant stated "I am going to kill you mother fuckers." Because of his behavior, the hospital staff would not treat him any further and discharged him from the hospital.

At approximately 7:25 A.M. that morning, defendant submitted to an evidentiary breath sample. The result of the test was a .103% blood alcohol level. This was approximately 5 hours after the alleged operation of the vehicle.

In her affidavit, Ms. DeBartolo states that on the morning of July 5, 2008, defendant was dropped off by a friend at her house. Ms. DeBartolo and defendant were together in the house for about an hour when she drove around the area to look for their dog, at about 2:00 A.M. Ms. DeBartolo states that she was driving a 2002 Honda Civic which was garaged at her home and was owned by defendant's brother.

Ms. DeBartolo states that she drove west on Bull Frog Hollow Road towards Granville, New York and then turned around and came back towards her house. She saw her dog in the Thompson's driveway. There were no lights on at the Thompson residence. She drove up their driveway and leaned over to open the rear door to allow the dog to get into the car.

The 2002 Civic has a standard transmission; therefore, while Ms. DeBartolo was holding the door open for the dog to jump in, the car may have rolled off the driveway

onto the Thompson's lawn. Ms. DeBartolo was honking the horn in the Thompson's driveway to get the dog's attention. She states on the Thompson's property between 5-10 minutes trying to get the dog.

After Ms. DeBartolo got the dog into the car, she drove next door to her home. She parked the car in her driveway. Defendant was at home during this time. She brought the dog inside and drove away in their other car, a 2004 Pontiac Sunbird. She drove to her boyfriend's home in Rupert, Vermont.

In route to her boyfriend's home, defendant's brother telephoned Ms. DeBartolo to say that defendant was "frantic." When she arrived at her boyfriend's home, she turned around and drove home. When Ms. DeBartolo arrived at her home, she saw the 2002 Honda Civic parked exactly in the same spot where she had left it before heading to her boyfriend's house.

Defendant states in his affidavit that at about 1:00 A.M., on July 5, 2008, a friend drove him home to 75 Bull Frog Hollow Road, Wells, Vermont. His mother, Desiree DeBartolo, was home at the time. After about an hour, Ms. DeBartolo left to look for the dog. She was driving the 2002 Honda Civic which was registered to defendant's brother. After a short while, Ms. DeBartolo returned home with the dog. She then left to go to her boyfriend's house. Defendant states that he did not drive any motor vehicle at any time after arriving home that morning, nor did he drive a car onto the property of the Thompson's.

The affidavits contain modifying evidence which, if found to be credible by a jury, would support verdicts of "not guilty" on the charges being challenged in the pending motions. Given the procedural posture of the case, however, the Court must

exclude this modifying evidence from its analysis, and view the evidence in the light most favorable to the State. See *State v. Baron*, 2004 VT 20, ¶ 2, 176 Vt. 314.

Discussion

In reviewing a V.R.Cr.P. 12(d) motion to dismiss, the court must determine whether the evidence would fairly and reasonably tend to show that defendant committed the offense beyond a reasonable doubt by examining the evidence in the light most favorable to the State, excluding the effects of modifying evidence. *State v. Baron*, 2004 VT 20, ¶ 2, 176 Vt. 314.

The law does not require the State to prove guilt by direct evidence alone, that is, by testimony from someone who actually saw the defendant commit the alleged act or offense. *State v. McAllister*, 2008 VT 3, ¶ 17. One or more of the essential elements, or all of the essential elements, may be established by reasonable inference from other facts which are established by direct testimony. Circumstantial evidence alone may be sufficient proof of guilt, if such evidence is proper and sufficient in itself. *State v. Kerr*, 143 Vt. 597, 602 (1983).

The sufficiency of circumstantial evidence to support a conviction is measured against the same as standard as all other evidence; it will sustain a conviction if sufficient to convince a reasonable trier of fact that the defendant is guilty beyond a reasonable doubt. *State v. Rollins*, 141 Vt. 105, 112-13 (1982).

When reviewing a case based largely on circumstantial evidence, the evidence "must be considered together, not separately," even if defendant can explain each individual piece of evidence in a way that is inconsistent with guilt. *McAllister*, 2008 VT 3, ¶ 19 (citing *State v. Baird*, 2006 VT 86, ¶ 13, 180 Vt. 243). "In assessing

circumstantial evidence, the fact-finder may draw rational inferences to determine whether the disputed ultimate facts occurred." *Id.* at ¶ 13 (citing *State v. Durenleau*, 163 Vt. 8, 12 (1994)).

I. Unlawful Mischief

Defendant is charged with one count of Unlawful Mischief in violation of 13 V.S.A. § 3701(c). The State must prove that defendant, having no right to do so or any reasonable ground to believe that he had such right, intentionally did any damage to property of any value not exceeding $250.00. 13 V.S.A. § 3701(c).

Defendant argues that the State cannot prove that he was the actual driver the motor vehicle which caused damage when it drove onto the Thompson's lawn on the morning of July 5, 2008. The essence of defendant's argument is that none of the State's witnesses can actually place defendant behind the wheel of the car which damaged the Thompson's property and that the State's circumstantial evidence does not connect defendant with the 2002 Honda Civic.

Viewing the evidence in a light most favorable to the State, on the morning of July 5, 2008, at approximately 2:30 A.M., June Thompson witnessed a vehicle drive into her driveway and onto her lawn, damaging the lawn. Louis Perry, the Thompson's neighbor, heard a vehicle driving on the Thompson driveway and lawn. June Thompson witnessed the car leave her property, drive onto Bull Frog Hollow Road, and then heard the vehicle drive up the VanBuren driveway to the VanBuren residence.

Louis Perry heard the vehicle leave the Thompson property and drive up the VanBuren driveway. Defendant showed up on the Thompson's property within 1-2 minutes after the vehicle drove up the VanBuren driveway and parked. Neither June

Thompson, nor Louis Perry heard any other car come or go until the police arrived. When the police arrived at the VanBuren residence, approximately 15 minutes later, defendant was the only person at home. There was only one car parked at the household, a silver 2002 Honda Civic. The width of the Honda Civic matched the track marks left in the Thompson's driveway and lawn.

It is a reasonable inference that the Honda Civic parked at defendant's residence was the car which drove onto the Thompson's lawn and that defendant was the only person who could have operated the vehicle. Defendant was on the Thompson's property within a few minutes of the car driving onto the lawn, he was the only person at home when the police arrived, and no other car was heard coming or going from the VanBuren residence.

Examining the evidence in the light most favorable to the State, and excluding the effects of modifying evidence, the evidence fairly and reasonably tends to show beyond a reasonable doubt that defendant was the driver of the vehicle which damaged the Thompson's property, and therefore he committed the offense of Unlawful Mischief beyond a reasonable doubt. See *State v. Baron*, 2004 VT 20, ¶ 2. Furthermore, the State is not required to exclude every reasonable hypothesis of innocence in proving its case with circumstantial evidence. *State v. Messier*, 146 Vt. 145, 150 (1985).

II. DUI

Defendant is charged with one count of Operating a Vehicle Under the Influence of Intoxicating Liquor in violation of 23 V.S.A. § 1201(a)(2). The elements which the State must prove are (1) operation of a motor vehicle; (2) on a highway, (3) while under the influence of intoxicating liquor. 23 V.S.A. § 1201(a)(2).

Defendant argues that none of the three elements can be proven by the State. He argues (1) the State cannot prove that defendant actually drove the vehicle; (2) the Thompson's driveway and lawn is not a highway; (3) there is no evidence that defendant was intoxicated at the time of operation of the vehicle.

As to the first argument, operation of the vehicle by defendant, the Court has already found *supra* that the circumstantial evidence taken in the light most favorable to the State, reasonably and fairly tends to show beyond a reasonable that defendant was the driver of the vehicle.

Second, according to the testimony of June Thompson, after the vehicle damaged her lawn and the driver drove back down her driveway, the vehicle entered onto Bull Frog Hollow Road in order to enter into the VanBuren driveway.

"Highway" includes all parts of any roadway open temporarily or permanently to public or general circulation of vehicles. 23 V.S.A. § 4(13); see 23 V.S.A. § 1200(7) (providing "Highway" shall be defined as in subdivision 4(13) of this title)). Bull Frog Hollow Road is a highway under this definition. Furthermore, the Thompson's driveway is also included under the definition of "Highway." See *State v. Eckhardt*, 165 Vt. 606, 607 (1996) (mem.) (holding private driveway to a single residence is "highway" for purposes of DUI). Thus, the operation occurred on a highway.

Third, defendant argues that there is only speculation as to whether he was intoxicated at the time of the driving and whether his intoxication was continuous from when he allegedly drove until the police arrived.

Intoxication may be evidenced circumstantially by prior or subsequent condition within such time that the condition may be supposed to be continuous. *State v. Canerdy*,

132 Vt. 131, 136 (1974) (citing 2 J. Wigmore, Evidence § 235 (3d ed. 1940)). Defendant cites *State v. Clark*, 130 Vt. 500 (1972), and *State v. Levesque*, 132 Vt. 585 (1974), for the proposition that the State must prove his intoxication was continuous from when he allegedly drove until the police arrived.

In *State v. Clark*, the State failed to present any evidence, either direct or circumstantial, of the time when the defendant had the accident. 130 Vt. at 503. Without such evidence, the State was unable to fulfill its burden of showing that the accident caused by the defendant occurred within a time that the intoxicated condition, in which he was found at the scene, had been continuous since the accident time. *Id.*

By contrast, in *State v. Levesque*, the close proximity in time between the accident and the officer's arrival at the scene, and the defendant's condition subsequent to the accident, provided sufficient circumstantial evidence that the defendant's intoxicated condition had been continuous since the time the accident occurred. 132 Vt. at 588. The instant case resembles *Levesque* and is distinguishable from *Clark*.

Here, the time of the erratic driving by defendant is known – it was 2:30 A.M., July 5, 2008. According to Russell Thompson, less than 2 minutes later defendant was "drunk and stumbling around" on the Thompson property.

According to Trooper Cushing, when defendant was taken into custody approximately 45 minutes later, "[i]t was obvious at the start and once VanBuren [defendant] was in custody that he was extremely intoxicated." Trooper Cushing "smelled a strong odor of intoxicants coming from him [defendant] and his breath. Van Buren's eyes were also bloodshot and watery. VanBuren appeared to be heavily intoxicated."

Presumably, defendant did not drink any alcohol while in custody. At approximately 7:25 A.M., almost 5 hours after the operation of the vehicle, defendant submitted to a breath evidence test in which he recorded a blood alcohol level of .103%.

Defendant's continuous erratic behavior from the time of operation of the vehicle to the time of the breath evidence test is further circumstantial evidence that he was intoxicated at the time of operation. This erratic behavior began when defendant drove onto the Thompson lawn, peeling rubber, blowing his horn repeatedly, and causing property damage. The behavior continued during a violent altercation with Russell Thompson, in which defendant threatened to kill Mr. Thompson, punched him in the nose, and eventually fled the property, "ranting and raving."

When the police arrived at the VanBuren residence, defendant was clad only in a towel and socks. He repeatedly yelled at police officers and threatened to kill them. He repeatedly ran in and out of his house. Defendant spit at Trooper Cushing. He pulled out an "imaginary" gun with his hands and pretended to shoot and kill the officers. Defendant also punched a glass window, lodged a 2-inch long piece of glass in his hand, and refused medical attention.

After police finally took defendant into custody, he tried to pull away, causing Trooper Cushing to take him to the ground with a leg sweep. This behavior continued in the ambulance ride to the hospital, where defendant was wholly uncooperative and continuously yelled sexual profanities, derogatory remarks, and racial slurs. After removing the 2-inch piece of glass from defendant's hand, the hospital staff at Rutland Regional Medical Center refused to treat him any further due to his behavior.

Defendant's intoxicated state less than 2 minutes after operation of the vehicle and his continuous erratic behavior during and after operation leads to the reasonable inference that he was under the influence of intoxicating liquor at the time of operation.

Examining the evidence in the light most favorable to the State, and excluding the effects of modifying evidence, the evidence fairly and reasonably tends to show beyond a reasonable doubt that defendant was operating a motor vehicle, operation was on a highway, and defendant was under the influence of intoxicating liquor during operation. See *State v. Baron*, 2004 VT 20, ¶ 2.

III. Impeding a Public Officer

Defendant is charged with one count of Impeding a Public Officer in violation of 13 V.S.A. § 3001. The elements which the State must prove are (1) defendant; (2) knowingly hindered an officer, (3) at the time of the alleged acts, the trooper was a law enforcement officer acting under the authority of this state; (4) defendant knew, or reasonably should have known, that the trooper was a law enforcement officer; and (5) defendant had no legal right to engage in the acts alleged to have hindered the officer. 13 V.S.A. § 3001.

The State has provided evidence that (1) defendant was the individual who acted, (3) that the troopers were law enforcement officers acting under the authority of this State, (4) that defendant knew or should have known the troopers were law enforcement officers, and (5) that defendant had no legal right to repeatedly yell at the officers and threaten to kill them.[3]

[3] For purposes of the instant motion the Court accepts the State's contention that the conduct noted in element (5) could reasonably support charges of both Noise in the Nighttime, 13 V.S.A. § 1022, and Disorderly Conduct, 13 V.S.A. § 1026(1). The Court notes that the State has not filed these charges and, as such, they are not before the Court.

According to the State's theory, and the information from Trooper Norton, the basis for the offense Impeding a Public Officer was that while investigating a crime the defendant hindered the investigation by continually making threats and causing law enforcement to believe that the defendant was going to kill law enforcement that was present to investigate a crime.

"Hinder" means to slow down or to make more difficult someone's progress towards accomplishing an objective; to delay, or impede or interfere with that person's progress. *State v. Oren*, 162 Vt. 331, 334 (1994).

The Vermont Supreme Court has held that 13 V.S.A. § 3001 must be read narrowly, or it will be unconstitutionally vague. *State v. Harris*, 152 Vt. 507, 509 (1989). The requisite intent of "knowingly" hindering is essential to a narrow reading of the statute. To read the statute broadly would mean that anytime an illegal action is taken by a defendant which results in the by-product of an impeded investigation, that defendant would have committed the offense of Impeding a Police Officer under 13 V.S.A. § 3001.

A person acts "knowingly" when:

> (i) if the element involves the nature of his conduct or the attendant circumstances, he is aware that his conduct is of that nature or that such circumstances exist; and (ii) if the element involves a result of his conduct, he is aware that it is practically certain that his conduct will cause such a result.

State v. O'Dell, 2007 VT , ¶ 16, 181 Vt. 475 (citing Model Penal Code § 2.02(2)(b); *State v. Trombley*, 174 Vt. 459, 461 n. 1 (2002) (mem.) (referring to Model Penal Code definition of "knowingly" in context of crime of assault)). The State need not provide direct evidence of defendant's intent; circumstantial evidence may by sufficient to prove that element beyond a reasonable doubt. See *State v. Cole*, 150 Vt. 453, 456 (1988)

(stating "intent is rarely proved by direct evidence; it must be inferred from a person's acts and proved by circumstantial evidence").

In numerous holdings in which the Supreme Court has found Impeding an Officer, it has done so while recognizing that, in each case, there was intent to interfere directly with a goal of the officer. See *State v. O'Dell*, 2007 VT 34, ¶ 4, 181 Vt. 475 (holding defendant's action in pushing police officer who was chasing a child was purposeful and therefore fulfilled element of knowingly hindering); see also *State v. Oren*, 162 Vt. 331, 335 (1994) (finding defendant threatened a deputy sheriff to prevent the deputy from serving civil process on her); see also *State v. Dion*, 154 Vt. 420, 422 (1990) (finding hindering where defendant physically pulled boy away from Warden in order to prevent Warden from processing boy); compare *State v. Stone*, 170 Vt. 496, 498 (2000) (finding there was no knowing hindering where there was no indication that defendant intended to go around the rear of her car and physically interfere with officer's arrest of her husband).

In the instant case, the State has not presented any evidence that defendant "knowingly" hindered the investigation at the Thompson residence. It was defendant's yelling that drew the attention of Trooper Cushing to the VanBuren residence. There is no evidence that defendant knew there was an ongoing investigation at the Thompson residence, or that he knew there were even law enforcement officers present at the Thompson residence.

While defendant's conduct was not legal in the sense that it may provide the basis for additional charges, there is inadequate evidence currently before the Court that defendant engaged in such conduct with the intent to impede the investigation.

Furthermore, Trooper Cushing testified that defendant never disobeyed any commands from the officers present on the scene.

Examining the evidence currently before the court in the light most favorable to the State, and excluding the effects of modifying evidence, the evidence fails to fairly and reasonably show beyond a reasonable doubt that defendant knowingly hindered the police investigation. See *State v. Baron*, 2004 VT 20, ¶ 2.

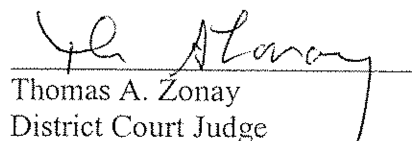
ORDER

For the reasons stated herein defendant's Motion to Dismiss for Lack of Prima Facie Case, Docket No. 985-7-08 Rdcr, Count 4 - Impeding a Police Officer is GRANTED and the charge is dismissed, without prejudice.

Defendant's Motion to Dismiss for Lack of Prima Facie Case, Docket No. 985-7-08 Rdcr, Count 3 – Unlawful Mischief is DENIED.

Defendant's Motion to Dismiss for Lack of Prima Facie Case, Docket No. 1118-7-08 Rdcr – Driving Under the Influence is DENIED.

Dated at Rutland, Vermont this 18th day of December, 2008.



Thomas A. Zonay
District Court Judge